IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 265

CLARENCE W. BLAIR,
Petitioner

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY, a Corporation,
Respondent

On Writ of Certiorari to the Supreme Court of Pennsylvania.

RESPONDENT'S BRIEF

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COUNTER-STATEMENT OF THE CASE

This is an action instituted under the provisions of the Federal Employers' Liability Act (45 U. S. C. A. Section 51) by Clarence W. Blair, a trucker employed by The Baltimore & Ohio Railroad Company in its warehouse or freight house in Ellwood City, Pennsylvania, to recover damages for personal injuries sustained by him in the course of his employment on June 26, 1939.

The case was tried on plaintiff's (petitioner here)

Statement of Claim, the negligence alleged being (1) alleged failure to furnish plaintiff with safe equipment to do the job; (2) alleged failure to supply the plaintiff with sufficient and competent help; (3) alleged failure of Messrs. Fanno and Miller, fellow employees, to use reasonable care in the handling of the pipe.

At the trial before the Honorable James L. O'Toole, Jr., J., the jury rendered a verdict in favor of the plaintiff in the amount of $12,000. The defendant (respondent here) filed a motion for new trial. The defendant, also, having presented a point for binding instruction in its favor, which had been refused by the Trial Judge, moved for judgment non obstante veredicto. After argument, the court en banc refused to enter judgment n. o. v., but granted a new trial because of error in the Charge. The Opinion of the Court was written by his Honor, Judge O'Toole, and the refusal of the motion for judgment n. o. v. is the Order from which appeal was taken by The Baltimore & Ohio Railroad Company, to the Supreme Court of Pennsylvania, and the plaintiff likewise filed an appeal from the granting of a new trial. The Supreme Court rendered judgment for the defendant (respondent here) 349 Pa. 436, 37 A. 2nd 736, whose decision your Honorable Court has consented to review.

The facts of the case are briefly as follows:

On June 26, 1939, petitioner, aged 42 years, was employed as a trucker in the freight house (also called the warehouse) of the respondent company in Ellwood City, Pennsylvania (12a). His duties consisted of the loading and unloading of inbound and outbound freight, and on said date he was the only employee in the said warehouse, where he had been working continuously as a trucker since

December 6, 1935 (30a-31a). For the purpose of this loading and unloading, the company had provided two nose trucks, a one-wheeled dolly, a six-wheeled dolly, a crowbar and rollers, all of which equipment was in the freight house on June 26 (32a-33a). The nose truck is a two-wheeled truck about five feet long (21a) with a piece of steel extending up on top of it about 8 inches, balanced on two wheels; it has two handles extending 10 or 12 inches on each side; which are on the opposite end from the two wheels (17a).

The petitioner testified that about 10:30 a. m. he had unloaded the other merchandise in a car which had been spotted at the platform next to the warehouse, and that at the bottom of the car there were three lengths of seamless steel tubing about 30 feet long, each being about 10 inches in diameter, the three weighing 3100 pounds, and consigned to the National Tube Company at Ellwood City from Lorain, Ohio (23a, 13a). There was a steel plate from the car to the station platform, and the floor of the car and the platform were almost level; when ready to unload the pipe, he went in and told the agent that the pipe was too heavy for him to handle and suggested that it be sent on to the Tube Mill; the agent told him to get Mr. Miller, the car inspector, and Domenick Fanno, section hand, to help unload them; petitioner told him he didn't think they could unload them; the agent then informed him that if he didn't do the work, he would get someone else who would (14a-15a). The agent did not speak harshly, he merely stated that if Mr. Blair didn't do it, he would get someone else to do the work (60a). Blair then got the two men and proceeded to unload the pipe. He stated that they got the first tube up on the nose truck, and one of the men was holding on one of the handles, and Mr. Fanno was

on the front end; they had to zig-zag it to get it cornerways out of the car to clear the door, as the pipe was too long to come straight out; they got the first one out and loaded it onto the Tube Mill truck which was on the opposite side of the warehouse (16a-18a); they then went back to get the second piece and loaded it onto the nose truck and started out with it after they had zig-zagged it to bring it out of the door of the car and as they went through the door, coming into the warehouse from the car, the uneven part of the floor caused the pipe to slip, or to start slipping on the nose truck and the two men, Miller and Fanno, both let go of it and jumped and Blair tried to hold it on the truck to keep it from kicking him, but it kicked off to the side and the foot of the truck struck him in the side (19a). He stated that at the door of the warehouse, on the floor there had been a thick board, six or eight inches wide, nailed there and then beveled, and that the floor of the warehouse was formerly level with the floor of the platform but it had sunk (20a); that the tube when it lit was completely inside the freight house station on the floor (43a), and that he had just started in the door of the warehouse or freight house when it started to slip straight ahead. Although he testified that the cause of the pipe's slipping was not adequate equipment and then the two men leaving go of the pipe (19a), he stated on cross examination that when he hung on to the truck, it made the pipe go sideways instead of coming clear back again, and that was when it hit him (44a). He also testified that the pipe was black and greasy (22a), and that if you got it out of balance it would slide either way on the truck, and further that the truck carried the weight—all the men had to do was to push and steady the pipe (38a-39a); and that the hand truck was not hard to push (59a).

Mr. Carl V. Main, the driver for the National Tube Company, came out of the office with his way-bills and helped the three men put the piece of pipe back on the nose truck, and they then loaded it onto the tube mill truck (41a). The three men then went back to the car and loaded the third piece, using the same equipment and the same method of procedure (47a). Mr. Blair didn't think he was injured to any extent, and he kept on working for the rest of the week although he consulted the company doctor who gave him some medicine and taped his side (23a). Of all the equipment at the warehouse, Mr. Blair chose the nose truck because he said he could not have handled the pipe as well on the dolly truck (20a). He did not choose to use another truck which was available because it had been a rebuilt truck, not as good and was higher (23a).

The respondent's witness, Mr. Robert Miller, testified that the accident occurred in the freight house by the truck —just as they were putting it on the truck (70a). He stated that when it started to slip the front wheels of the hand truck were about 10 feet from the Tube Mill truck; that the end of the pipe had started into the Tube Mill truck and that it slipped into the said Tube Mill truck (71a). This witness had helped Mr. Blair before to move heavy freight, including tubing, and they used a nose truck (72a). They usually moved tubing for the National Tube Company by hand truck and laid it across the truck the same as was done in this case (73a). The only cause for the tube slipping was that it was greasy and hard to hold on to, steel against steel (74a). He stated that the weight of the tube caused the handles to fly out of his hand (74a).

Respondent's witness, Domenick Fanno, testified that

they had no trouble unloading the first piece of pipe, and that after they had put it on the Tube Mill truck, they went back to get the second piece (75a-76a). He stated that when they got the other piece and were near the truck, then they gave a push, and when they gave a push the little truck went against the big truck and the pipe went against the truck and the truck kicked back and hit Mr. Blair (75a). Mr. Fanno was on the front all the time; Mr. Miller was holding a handle on one side and Mr. Blair was holding the handle on the other side (76a). They loaded the third piece of pipe by the same method (77a). Mr. Fanno had helped Mr. Blair many times to load heavy pieces of freight (77a). Respondent's witness, Mr. Carl V. Main, testified that he had seen Mr. Blair handle tubing with two-wheeled trucks before and that everybody does it that way (88a) and that although he had never seen him load pieces as long as this one, he had seen pieces that were larger in diameter (89a).

Respondent's witness, Paul B. Forsythe, then cashier and chief clerk, described the equipment and stated that it was in good condition on said date (90a-91a). He denied that he had any conversation with Mr. Blair relative to loading this pipe and stated that he had assisted Mr. Blair with heavy pieces on other occasions (91a). He testified that the proper method was to use the one-wheeled dolly for oiled pipes because it cannot slip as it would on a nose truck but that it can be usually balanced on either (92a), and that they had handled heavier tubing than this, some with one inch wall, 33 to 34 feet long and have used the equipment described (92a-93a). He further stated that Mr. Blair had been instructed to get help in the loading and unloading of heavy pieces of equipment (93a).

ARGUMENT

Respondent respectfully submits that the judgment of the Supreme Court of Pennsylvania entered in its favor is not erroneous, but is in accordance with the applicable decisions of the Supreme Court of the United States, and therefore should be sustained. The main burden of petitioner's complaint is that the Courts of Pennsylvania deprived him of his constitutional right to trial by jury. Obviously, all plaintiffs are not entitled to a trial by jury. In any action based upon negligence, whether it be a proceeding under the Federal Employers' Liability Act, or any Act of Assembly or the common law, the plaintiff or claimant in the Court below has the burden of establishing negligence. The mere happening of an accident is not sufficient, nor is negligence which is not the proximate cause of plaintiff's injury. The plaintiff must prove first, that there was a negligent act of the defendant, and secondly, that that act contributed to his injury. In the case now before the Court, the reason for the granting of judgment in favor of the defendant by the State Courts, both the Court of Common Pleas of Allegheny County, Pennsylvania, and the Supreme Court of Pennsylvania, was not that there was not sufficient evidence of negligence, but that there was no evidence of negligence. We make the following quotations from the Opinion of the Supreme Court of Pennsylvania, 349 Pa. 456, as reported in 37 A. 2nd 736; at p. 736 the Court says:

> "After a trial in which he got a verdict, a new trial was granted, as the learned trial judge explain-

ed, because he had submitted to the jury defendant's liability for "* * * failure to provide adequate equipment for the work; failure to provide sufficient help, and carelessness of its employees * * *"; he stated that after reflection he had concluded that there was no evidence to support a finding of inadequate equipment or insufficient help and therefore a new trial was necessary to correct the error."

Page 737:

"In addition to alleging the elements of inadequate equipment and insufficient help, as to which the court said there was no evidence, the plaintiff alleged that he was injured by the negligence of defendant's servants. We think there was no evidence of such negligence."

Page 738:

"We can see nothing in that evidence that would justify a finding that defendant's servants were negligent in handling the freight. As the witness said, when the pipe was balanced on the truck, 'All you had to do was push and steady it'; a risk of the employment was that the equilibrium of the pipe might be disturbed but that was a risk which the workman assumed. Cf. Guerierro v. Reading Co., 346 Pa. 187, 29 A. 2d 510; Reusch v. Groetzinger, 192 Pa. 74; 43 A. 398; Cacchione v. Hagan & Co., 249 Pa. 32, 94 A. 440; Pennsylvania R. Co. v. Brubaker, 6 Cir., 1929, 31 F 2d 939."

Page 739:

"The mere happening of this unfortunate accident is not evidence of negligence. The obvious risk

of the employment was that the pipe might get out of balance and if it did, that men would instinctively act to protect themselves. We see no evidence to support a finding of negligence. Cf. Detroit, G. H. & M. Ry. v. Maldonado, 6 Cir., 1932, 59 F. 2d 911."

From the foregoing quotations, it is obvious that the Courts of Pennsylvania found that there was "no evidence of negligence". Therefore, if there were *no evidence* of negligence, there were no facts to be submitted to the jury upon which to base a finding of negligence. Respondent submits for the consideration of your Honorable Court its argument in support of the judgment in its favor, under the following headings:

I. *Judgment for Respondent (Defendant Below) Was Correct*

(a) Power of State Court to enter judgment non obstante veredicto.

(b) Failure of petitioner (plaintiff below) to prove negligence.

(c) Assumption of risks of employment.

(d) Cases cited by petitioner distinguished.

II. *Judgment on Verdict Not Maintainable Because of Erroneous Charge of the Trial Judge*

Argument

PART I.

JUDGMENT FOR RESPONDENT (DEFENDANT BELOW) WAS CORRECT

(a) *Power of State Court to Enter Judgment Non Obstante Veredicto*

Petitioner alleges that his constitutional right to trial by jury has been violated.

He bases this contention upon the 7th Amendment to the Constitution of the United States, which provides inter alia that, "in suits at common law * * * the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of common law". If the contention of the petitioner is correct, then no judgment notwithstanding the verdict could be entered in any action at common law. It is a well known fact that judgments of this nature have been entered by the courts both State and Federal in many actions instituted under the Federal Employers' Liability Act, which is a common law action.

In the early case of *The Justices, etc. vs. United States ex rel. Murray*, 76 U. S. 658, 9 Wall. 274-282, it is decided that:

> "* * * the 7th Amendment could not be invoked in a State Court to prohibit it from re-examining, on a writ of error facts that had been tried by a jury in the court below".

This case is cited in the later case of *Chicago B. & Q. R. Co. vs. City of Chicago*, 166 U. S. 226, 17 Supreme Court 580-587.

In *Minneapolis and St. Louis Railroad Company vs. Bombolis*, 241 U. S. 211, 36 Supreme Court 595, the Opinion of the Supreme Court delivered by Mr. Chief Justice White reads at p. 596:

> "Did the 7th Amendment apply to the action of the state legislature and to the conduct of the state court in enforcing at the trial the law of the state as to what was necessary to constitute a verdict? Two propositions as to the operation and effect of the 7th Amendment are as conclusively determined as is that concerning the nature and character of the jury required by that Amendment where applicable. (a) That the first ten Amendments, including, of course, the 7th, are not concerned with state action, and deal only with Federal action. We select from a multitude of cases those which we deem to be leading: Barron v. Baltimore, 7 Pet. 243, 8 L. ed. 672; Fox v. Ohio, 5 How. 410, 434, 12 L. ed. 213, 223; Twitchell v. Pennsylvania, 7 Wall. 321, 19 L. ed. 223; Brown v. New Jersey, 175 U. S. 172, 174, 44 L. ed. 119, 120, 20 Sup. Ct. Rep. 77; Twining v. New Jersey, 211 U. S. 78, 93, 53, L. ed. 97, 103. And, as a necessary corollary, (b) that the 7th Amendment applies only to proceedings in courts of the United States, and does not in any manner whatever govern or regulate trials by jury in state courts, or the standards which must be applied concerning the same. Livingston v. Moore, 7 Pet. 469, 552, 8 L. ed. 751, 781; Supreme Justice v. Murray (Supreme Justice v. United States) 9 Wall. 274, 19 L. ed. 658; Edwards v.

Elliott, 21 Wall. 532, 22 L. ed. 487; Walker v. Sauvinet, 92 U. S. 90, 23 L. ed. 678; Pearson v. Yewdall, 95 U. S. 294, 24 L. ed. 436. So completely and conclusively have both of these principles been settled, so expressly have they been recognized without dissent or question almost from the beginning in the accepted interpretation of the Constitution, in the enactment of laws by Congress and proceedings in the Federal courts, and by state Constitutions and state enactments and proceedings in the state courts, that it is true to say that to concede that they are open to contention would be to grant that nothing whatever had been settled as to the power of state and Federal governments or the authority of state and Federal courts and their mode of procedure from the beginning."

Finally, in the very recent case of *Brady vs. Southern Railway Company*, 320 U. S. 476; 64 Supreme Court 232, the matter seems to have been put at rest. This was an action to recover for the wrongful death of plaintiff's intestate and was under the Federal Employers' Liability Act. The plaintiff recovered a judgment in the trial court of the State of North Carolina; the Supreme Court of that State reversed the judgment for the plaintiff, which action of the State Court was affirmed by the United States Supreme Court. We quote the following from the Opinion by Mr. Justice Reed at p. 234:

"When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by nonsuit, directed verdict or otherwise in accordance with the applicable

practice without submission to the jury, *or by judgment notwithstanding the verdict*. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims. Galloway v. United States, 319 U. S. 372, 63 S. Ct. 1077," and other cases.

While four of the learned Justices dissented from the majority opinion, it is interesting to note that their dissent is based upon the effect of the evidence as establishing negligence rather than upon any irregularity in the procedure in the State Court.

We respectfully submit, therefore, that the 7th Amendment to the Constitution did not prevent the entry of judgment n. o. v. by the State Court in the case at bar.

(b) *Failure of petitioner (plaintiff below) to prove negligence*

Preliminarily, the Trial Judge ruled out of this case any question of negligence of the respondent company as to the condition of the floor which was alleged by the plaintiff to have caused the pipe to slip on the nose truck. This is apparent from a reading of the Charge of the Court which set out all possible elements of negligence which the plaintiff attempted to prove under the allegations of his Statement of Claim (117a-118a).

This ruling of the Court was correct, for the reason that there was no evidence to show any defect in the floor, or, if the testimony had shown such defect, that the Rail-

road had knowledge, actual or constructive, of the same; and also, that even if there had been such proof, the defendant would not be liable where the employee's knowledge of the situation and the dangers existing was equal to that chargeable against the Railroad: *Schilling vs. Delaware and Hudson R. Co.*, 114 Fed. 2d 69; *Toledo St. L. & W. R. Co. v. Allen*, 276 U. S. 165, 48 S. C. 215-217.

In his Opinion, in support of the Order appealed from, at page 135a, Judge O'Toole specifically found that "while there was sufficient testimony to support the third particular (carelessness of its employees in handling the pipe) and, therefore, to permit the plaintiff to recover, there was no sufficient testimony to support the first and second, although under the charge of the court the jury was permitted to base a recovery on either."

We submit that the Court was in error in not finding that the third ground of negligence was also not substantiated by the testimony. In order to show how the petitioner attempted to prove his case, we will refer to the three grounds of negligence alleged as follows: (1) Alleged failure to furnish petitioner with safe equipment to do the job; (2) Alleged failure to supply the petitioner with sufficient and competent help; (3) Alleged failure of Messrs. Fanno and Miller to use reasonable care in the handling of the pipe, and particularly the allegation in Fanno's testimony that they "gave it a push".

Petitioner rested his case on negligence on his own uncorroborated testimony. He first stated that the uneven place in the floor caused the pipe to slip, and then, later testified that the cause of the pipe slipping was "not adequate equipment for the first thing, just nothing but the nose truck; then the two men leaving go of it" (19a), and

again at (44a), on cross examination, stated: "When I hung on to the truck made the pipe go sideways instead of coming clear back again", so that we have three distinct causes for the accident appearing in his own case. The burden of proof rested upon the petitioner, (plaintiff below) as stated in 35 *American Jurisprudence*, Section 493, pages 907-908:

> "The general rules of evidence respecting the burden of proof and the burden of proceeding are the same in actions for injuries to employees as in other judicial proceedings. Fundamentally, the plaintiff has cast upon him the obligation of establishing every element of the case necessary to a recovery. He has the burden of proving the existence of the relationship of employer and employee at the time of the injury complained of; the employer's negligent act or omission respecting the duty which it is alleged was breached, that is, failure of the employer to exercise ordinary care for the safety of the injured employee or his failure to comply with a statutory duty imposed upon him; the happening of the injury as alleged; the causal relation between the employer's fault and the injury, the fact that the alleged breach of duty was the proximate cause thereof; and the character and extent of the employee's sufferings and the damages by reason of the injury. The plaintiff, however, need only raise a reasonable presumption that the cause of the injury was the conduct of the defendant.
>
> "It is incumbent upon the plaintiff to negative any inference that the injury resulted from a danger for which the defendant was not responsible.

"Negligence on the part of the employer is an affirmative fact that must be established by the injured employee; he must show that by some act or omission, the employer has violated some duty which he owed to the employee and which caused the injury complained of. The negligence on the part of the employer cannot be presumed from the mere fact of an injury sustained by the employee in the discharge of the duties of his employment, although many courts recognize that the circumstances under which the injury occurred may give rise to an application of the doctrine res ipsa loquitur. Generally, however, negligence cannot be inferred from the happening of an accident to an employee or from the discovery in a machine or other instrumentality of a latent defect, for which under the existing circumstances no responsibility can be imputed to the employer. There is no liability for injury to a servant unless there has been some negligence for which the employer is liable."

Even under the Employers' Liability Act, the employer is not an insurer of his employee's safety. There must be negligence proven against it: *Chicago and N. W. Ry. Co. v. Payne*, 8 Fed. 2nd 332-334. In the foregoing quotation from American Jurisprudence we call attention to the following phrase, indicating one of the elements which the plaintiff (petitioner here) has the burden of proving, namely, "the causal relation between the employer's fault and the injury, the fact that the alleged breach of duty was the proximate cause thereof". If the cause of the pipe slipping was an unevenness in the floor, then the plaintiff cannot recover because the Court has found no negligence on the part of the respondent as to the condition of the floor. If it was caused

by inadequate equipment, then likewise there can be no recovery because as shown in the Counter-Statement of the Case in this Brief, this same equipment was used in loading and unloading material of all kinds, including tubing, by this same employee not only for a number of years prior to the accident, but on the very day of the accident subsequent thereto. It will be recalled that the three men had unloaded the first of three identical pieces of pipe or tubing and had placed it on the Tubing Mill truck without any difficulty whatever, and after the accident they unloaded the third piece in exactly the same manner. This testimony adduced by the plaintiff himself proves that the equipment was adequate. Some question was raised in the defendant's (respondent) case as to whether this plaintiff (petitioner) made a wise choice in selecting the nose truck instead of the dolly, but as he was in charge of the unloading job and was experienced, and as he himself decided to use the nose truck, the respondent could not be charged with his mistake. The petitioner testified to no facts which would form the basis of a finding that the equipment was inadequate. His mere statement that it was inadequate proves nothing. This is the same as a man showing that he suffered an accident and failing to indicate wherein the defendant was negligent. No one would suppose for a moment that in this latter case, the petitioner could recover, because he must show more than the mere happening of an accident. In the case of *Missouri Pac. R. Co. v. Aeby*, 275 U. S. 426, 48 Supreme Ct. 177, the Court states at page 179: "No employment is free from danger. Fault or negligence on the part of the petitioner (the railroad company) may not be inferred from the mere fact that respondent fell and was hurt." In *Rodell vs. Adams*, 231 Pa. 284, 80 A. 253, a nonsuit was affirmed in a case stated in the syllabus as follows:

"1. In an action by an employee against his employer to recover damages for personal injuries from the breaking of an emery wheel, where the only negligence alleged is that the arbor or spindle on which the wheel ran was too light, a nonsuit is properly entered if it appears from the plaintiff's own testimony that he had had twenty years experience in the use of emery wheels, that he had selected the wheel in question himself from the stock in the factory and had placed it on the machine, that he had told his employer that it was difficult to grind tools on the wheel, but that he had not spoken of its being dangerous, and that he did not believe that it was dangerous.

"2. In an action for negligence it is not enough that a cause of action be shown, it must be the cause alleged."

What has been said of inadequate equipment applies also to inadequate help. The only evidence to show that the help supplied to the petitioner was inadequate was that the men were in their middle or late sixties. There is absolutely nothing indicating that they were inexperienced in the handling of freight or that they were not physically able to do this job. The men themselves testified that they had helped him with loading and unloading freight before (72a, 77a, 93a). The petitioner furnishes us with the information that the pipe was greasy (22a) and that if you got it out of balance it would slide either way, and that the truck carried the weight of the pipe; that all the men had to do was to push and steady the pipe, and that the hand truck was not hard to push (39a, 59a). Petitioner proved nothing upon which a charge of negligence could be predicated for failure to furnish sufficient help excepting the ages of the two men,

neither of which he could state accurately, testifying at page 16a: "They are both pretty old men. I do not know just the age but around sixty-five, I guess, seventy years old, maybe, Mr. Miller might be somewhere around that. How old is Mr. Fanno? Well, I would say he is in his sixties."

In the case of *Rickert v. Stephens*, 133 Pa. 538, 19 A. 410 a nonsuit was granted in a case where youth rather than age was an item of alleged negligence. What applies to youth applies also to age. If the plaintiff is attempting to show incompetence of these two helpers, then we say that he has failed to meet the requirements of the case of *Snodgrass vs. Carnegie Steel Co.*, 173 Pa. 228, 33 A. 1104, set out in the syllabus as follows:

> "In an action by a servant against his master to recover damages for personal injuries where the plaintiff claims that the injury was caused by an incompetent fellow servant whom the master had negligently employed, the plaintiff in order that he may recover, must show by affirmative testimony (1) that the accident was the result of some negligent act or omission of the fellow servant; (2) that the fellow servant was incompetent for the duty he had to perform; (3) that the fact of his incompetency was known to the defendant when he was employed by reason of the fellow servant having a reputation for incompetency, or that the defendant had knowledge of the incompetency during the employment and before the accident."

Also, it must be remembered that after this accident happened, this petitioner, without protest to anyone, using the same nose truck and with the help of the same two aged men, loaded the third piece of pipe which was of the

exact size of the second, carted it across the warehouse floor and unloaded it into the Tube Mill truck. Nowhere in the record do we read of any protest made to the men themselves or to the station agent as to either equipment or helpers, although he had just been injured as above indicated.

In the early case of *Frazier vs. Penna. R. R. Co.*, 38 Pa. 104, we find the following language of Chief Justice Lowrie which applies to this case:

> "But if the plaintiff knew that his conductor was habitually careless, and chose to continue in service with him, and did not inform the company of his known acts of carelessness and refuse to serve with him, he can have no claim against the company for injuries suffered from further carelessness, even if the company did also know: 25 Alab. 659; 20 Barb. 449; 28 Id. 80; 4 Seld. 175; 5 Ohio St. R. 541; 2 Hurlst. & N. 258, 768; 9 Exchcq. 223; 27 Law T. R. 325; 28 Id. 139; Smith's Master and Servant 147, 150."

In the case of *Lloyd vs. Norfolk and W. R. Co.*, 145 S. E. 372; 151 Va. 409, it was held that where a track laborer had loaded seven rails with the same assistance this fact showed that the work could be accomplished with safety by the force then employed.

The third ground of alleged negligence is as stated by the petitioner "the two men leaving go of it". Mr. Blair had testified, it must be recalled, that what started the pipe to slip was the unevenness of the floor, or at another place, "not adequate equipment" (19a), neither of which forms a basis of recovery because no negligence has been proven. After the pipe started slipping, all three men had

one of two alternatives, either to hold on to the handle or pipe, or to let go. Mr. Fanno was at the front of the truck, and was, we presume, steadying the pipe with his hand. The petitioner did not attempt to describe his exact actions, contenting himself with the statement that Fanno was at the front of the truck, and we know that there was no handles on the front of the truck. The pipe was greasy and slippery, and when it started to slide Mr. Fanno could do nothing but get out of its way. Mr. Miller was on the left handle and Mr. Blair on the right. Each man, according to his own testimony, followed the first law of nature, which is self-preservation. Mr. Blair's testimony, on cross examination, at page 44a, was to the effect that his own action in hanging on to the truck made the pipe go sideways instead of coming clear back again. The learned Judge of the Court below gave great weight to the statement made by Mr. Fanno in defendant's case that "we give him a push" (76a).

True it is that on a motion for judgment n. o. v., the petitioner is entitled to the benefit of all the evidence in his favor, and all the inferences to be drawn therefrom, but in order to benefit by this statement of Mr. Fanno, he must admit that his own testimony, as to the place where this accident happened and its cause, was false. If the proximate cause of the sliding of this pipe was the fact that Fanno, Miller and the plaintiff pushed the pipe which caused the little truck to go against the big truck and then the pipe skidded onto the bed of the automobile truck (75a), it is absolutely necessary to discard the testimony of the petitioner himself (1) that the pipe began to slip because of the unevenness of the floor; (2) that the men let go of the nose truck and that the pipe slipped onto the warehouse floor (19a, 43a).

Both versions of the occurrence cannot stand together, as they are as irreconcilable as black and white. However, if we say, for the sake of argument, that a jury would be justified in giving to petitioner the benefit of this statement of Mr. Fanno, then let us consider whether or not giving the pipe or truck a push could be negligence under the facts of this case. Mr. Fanno testified, at page 75a: "We went and get that pipe on the truck. We put him on the truck and come back to get the other one. When we get the other one and we was near the truck we give a push and when we give a push the little truck went against the big truck and the pipe went on the truck and truck kicked back and hit Mr. Blair in here (indicating) * * *. We had no trouble with the first piece, no. Second piece, just we give him push and little truck went against the big truck and jumped back and hit Mr. Blair in here (indicating) * * *" (76a). "When we give shove the pipe, the car went and heavy weight of the pipe when hit against the Tube Mill truck, why, the car kicked, went way out and hit him here (indicating)" (76a-77a). And at page 79a, on cross examination in answer to the question, "You say that you skidded the pipe from the truck onto the bed of the automobile truck?" he answered, "Yes, sir, all three right on top of it." (79a) A reading of the testimony of Mr. Fanno in toto plainly indicates that he does not readily speak the English language, and also that he uses what might be called a very general method of description in that he showed a tendency to testify not only as to what occurred that day, but also as to the many times he and his gang of workmen would assist in moving heavy pieces of freight from the Tube Mill truck into the cars, giving answer not responsive to the questions of counsel.

The only method of propelling the nose truck was by pushing it along by the use of the two handles on the end

of it, which were manned by Mr. Miller and the petitioner. If they did not push the vehicle, it would remain stationary. Fanno himself, was in no position to do any pushing; he was at the front of the truck and was helping steady the pipe thereon. The pipe was greasy and slippery, and how he could push it is somewhat of a mystery. Therefore, when he said "we give it a push," he could have meant only Miller and Blair who were pushing the nose truck along the floor. This testimony was brought out in respondent's case, and petitioner did nothing to use it to his advantage. He did not even cross-examine Fanno as to how much of a push they gave it, whether it was an ordinary or extraordinary push, what part of the nose truck struck the Mill truck, or any other particulars, and this for a very good reason. Petitioner's version of the affair was that the accident did not happen at any place near the Mill truck; he was hoping to rely upon his alleged negligence in the construction of the floor or the fact that the furnishing of two men to assist him might be held inadequate. The push indicated by Fanno could take place at one point only, and that was if and when the little truck hit against the Mill truck. What happened when the push occurred? The pipe slid down onto the bed of the truck, which, as the Trial Judge states in his charge, was the natural result of their act. As showing the trial Court's understanding of the situation, we quote the following from his charge at page 115a:

> "The natural result of them doing that would have caused greased pipe to slide forward, which is exactly what they desired it to do, on to the bed of the automobile truck. The pipe did start to slide forward, as they intended, when they gave it a push. Naturally, as soon as one end of that pipe touched the floor, the weight of

the pipe being towards the floor would cause the nose truck to do exactly what the witness said it did do, fly back and hit Mr. Blair."

If they, including petitioner, desired the pipe to slide down onto the truck, and it did that, there certainly could be no negligence in giving it a push to bring about what the Court says was the natural and desired result. In order for this push or shove to be an act of negligence, it was the burden of the petitioner to prove that it was an unusual, extraordinary, and unnecessary push or shove, and as indicated above, he failed to offer such proof even by the cross examination of respondent's, witness Fanno.

Again, petitioner knew that the pipe was greasy and that if he got it out of balance it would slide either way; also, that by some method, the pipe would have to be skidded onto the Tube Mill truck. He failed to show that pushing it even by shoving the little truck against the big truck was anything out of the ordinary. Therefore, he assumed the risk of getting hurt if anything should go wrong in the prosecution of the work such as the pipes starting to slip or the handles kicking back.

The law requires petitioner, plaintiff below to prove by a preponderance of the evidence that the negligent act of the fellow servants proximately caused the hand truck to kick back and inflict the damage. The truck kicked back, under the petitioner's own testimony, because of the added weight, on the nose, and the truck kicked back in his direction and hit him on the side because he held on to the hand truck. Therefore, his holding on to the handle of the hand truck was the proximate cause of his injury and not any act of negligence on the part of the fellow employees: *Detroit, G. H. & M. Ry. Co. v. Maldonado*, 59 Fed. 2d 911.

Argument

(c) *Assumption of risks of employment*

This accident happened on June 26, 1939, prior to the amendment of the Federal Employers' Liability Act (which was adopted August 11, 1939) and therefore, the defense of assumption of risk even of ordinary negligence is a complete bar. All of the acts set forth heretofore in this Argument were risks which it was absolutely necessary should be assumed by the petitioner. He knew that the piece of tubing was to be placed upon the Mill truck; he had assisted in unloading many of these pieces theretofore; the method employed in getting the pipe on to the bed of the truck was apparently the only one that could be used. He assumed the risk of the pipe slipping off the dolly, and perhaps crushing his foot; of the car kicking back as it did and striking some part of his body and injuring him, or of strain caused by overexertion and many other features of the employment.

In the case of *Dutrey, Admr'x. vs. Phila. & Reading Rwy. Co.*, 265 Pa. 215, 108 A. 620, the law is stated by Mr. Justice Kephart at page 219 as follows, based upon United States Supreme Court decisions:

> "The employee assumes, as a risk of his employment, such dangers as are normally and necessarily incident to his occupation, and a workman of mature years, is taken to assume them whether he is aware of their existence or not; but risks of another sort, but naturally incident to the occupation, may arise out of the failure of the employer to exercise due care. They are the unusual, extraordinary and unexpected acts, and the employee is not to be treated as assuming such

risks until he becomes aware of their existence, unless the act or risk is so obvious that an ordinarily prudent person would have observed and appreciated them: Seaboard Air Line v. Horton, supra; Jacobs v. Southern Ry., supra; Boldt v. P. R. R., supra; C. & O. Ry. Co. v. DeAtley, 241 U. S. 310, 315; Erie R. Co. v. Purucker, 244 U. S. 320; C. & O. Ry. Co. v. Proffitt, 241 U. S. 462, 468."

It is submitted that the petitioner here assumed the risk of moving the tubing with the assistance of two men and the hand truck, where the petitioner, an experienced trucker and freight handler, was thoroughly familiar with the movement of heavy objects, and the question of proximate cause was one for the Court and not the Jury, and in this case the verdict should have been directed for respondent-defendant below: *Fitzgerald vs. Pa. R. R. Co.*, 121 Pa. Superior Ct. 461, 184 A. 299.

There is no testimony here that either Fanno or Miller voluntarily released their hold upon the tubing or exerted less than their utmost physical strength to support it, or handled it in any unusual manner, or were otherwise guilty of any fault. It is apparent from the petitioner's testimony, and from the weight of the tubing, that the force of the impact of the tube upon the nose of the truck was greater than that anticipated by plaintiff, Miller and Fanno. The result of the truck kicking back can be characterized as nothing more than a normal incident to the work in hand and as a risk assumed: *Pa. R. R. Co. vs. Brubaker*, 31 Fed. 2d 839.

Therefore, the fact of the truck's kicking back was a risk to be anticipated and one against which all three men attempted to protect themselves, each in his own way:

Fanno by stepping away from the slipping pipe, Miller letting go of the handle when the pipe slipping out of the truck forced it out of his hand by its weight, and the plaintiff, Blair, by hanging onto the handle.

In the late case of *Guerierro vs. Reading Co.*, 346 Pa. 187, 29 A. 2d 510, the plaintiff was injured on November 16, 1938. His action to recover damages was instituted under the provisions of the Federal Employers' Liability Act. The first trial resulted in a verdict for the plaintiff in the sum of $3100; a new trial was granted, and at the conclusion of the plaintiff's case at the second trial, a nonsuit was entered. The appeal to the Supreme Court was from the refusal of the Court below to take off the nonsuit. Because of the applicability of this decision to the several features of our case, we make the following quotations from the able opinion written by Mr. Justice Drew:

> "The accident happened on the morning of November 16, 1938, as plaintiff, a section hand of fifteen years' experience with defendant company, and three other laborers, in the performance of their regular duties, were rolling a motor truck, laden with various tools and equipment, from a tool house, over a turntable, onto an adjacent side track, preparatory to proceeding thereon to their destination along the interstate tracks of defendant railroad upon which they were to work that particular day. In so doing, the two front wheels of the truck left the track. Before replacing them, however, the men awaited the return of their foreman and plaintiff informed him that the truck was too heavy and that more men were needed to raise it. The foreman, without promising any additional assistance, told them: 'You raise it.' Thereupon the four men lifted the

end of the truck to the rails without even attempting to remove the tools and equipment therefrom, and while doing so plaintiff suffered an injury to his back. Although he complained thereafter from time to time of pain, he nevertheless continued at his regular employment for eight to ten weeks following the accident without seeking medical care.

"Since there is no question involved here as to any violation of regulations of the Interstate Commerce Commission, or other Acts of Congress, there can be no recovery by plaintiff, under the provisions of the Federal Employers' Liability Act, in the absence of negligence on the part of defendant company: Casseday v. B. & O. R. R. Co., 343 Pa. 342; New Orleans & N. E. R. R. Co. v. Harris, 247 U. S. 367. Moreover, the mere happening of an accident raises no presumption that it was caused by negligence: Huff v. Illinois Cent. R. Co., 362 Ill. 95, 199 N. E. 116. The negligence upon which plaintiff bases his right of recovery is illegal inadequacy of help provided by defendant company to raise the derailed truck and place it back upon the track. To sustain this claim, he offered only his own testimony. Plaintiff testified that on previous occasions when the truck was derailed that 'if one end of the truck would fall (off the track) of course, it wouldn't require eight men, but if the entire truck was off, it would.' In answer to the question: 'I say, if eight men could lift the whole truck, four men could lift half a truck, couldn't they, yes or no?' plaintiff replied: 'Yes, sir, but of course, to lighten the weight on each individual, if there were eight around we would use eight.' *The record is devoid of*

any testimony from which it could be possibly inferred that the lifting of the truck was being done in other than the usual and customary manner, and that four men, as were used at the time plaintiff sustained his injuries, were inadequate, and for that reason there was nothing upon which a jury could have predicated a finding of negligence. It is well established that an employee is conclusively presumed to have knowledge of the ordinary risks incident to the occupation in which he voluntarily engages Roberts, Federal Liabilities of Carriers (2d ed.), Vol. 2, sec. 831, pp. 1608-09. In the present controversy, it clearly appears that plaintiff assumed the risk arising from the act of placing the truck or hand car upon the track, which was part of his regular duties incident to his employment, and thus is precluded from recovery.

"Even if the evidence offered were sufficient to sustain a finding of negligence, we are still of the opinion that under the undisputed facts defendant company is not liable. It is equally well settled that an employee is regarded to have assumed the risk attributable to his employer's negligence of which he is aware: Ches. & Ohio Ry. v. Proffitt, 241 U. S. 462. The burden of proving assumption of risk is on the employer, unless, of course, the evidence undisputedly shows such assumption: Kanawha Railway v. Kerse, 239 U. S. 576. Plaintiff testified: 'I know it was too heavy even before beginning to lift it', and he must, therefore, be regarded to have assumed the risk of overexertion. In Harmon v. Seaboard Air Line Ry. Co., 110 S. C. 153, 96 S. E. 253, it was held that a section hand had assumed the risk of injury in lifting a

piece of timber, even though the crew engaged to do the work was inadequate. It was said in Gulf, C. & S. F. R. Co. v. Spivey (Tex. Civ. App.), 56 S. W. (2d) 655, certiorari denied 290 U. S. 676; 'The rule seems to be generally sustained that, "in the absence of any emergency, where a servant knows or ought to know that the master has furnished too few servants for the reasonably safe prosecution of the work, he assumes the risks incident to working with insufficient assistance." 39 C. J. 744; Missouri, O. & G. R. Co. v. Black (Tex. Civ. App.), 176 S. W. 755. The duty of the servant in such cases is to quit the service. And in cases where injuries result in the absence of any emergency, from overtaxing his strength and overstraining his muscles, the uniform rule seems to be that the servant, who is the best judge of his own strength, assumes the risk of the consequences (citing numerous cases).'

Plaintiff contends, however, that he is absolved from the defense of assumption of risk for the reason that he complained that the truck was too heavy and that more help was needed before attempting to lift it, and that the foreman told him to proceed with the work. With this argument we do not agree. No promise was made that assistance would be forthcoming. There is not one iota of testimony from which any inference could be drawn that plaintiff relied upon the foreman's judgment, rather than his own. He labored under no compulsion or in any emergency. In this connection, it was said in Huff v. Illinois Cent. R. Co., supra: 'He (plaintiff) testified that he asked his foreman for additional help to remove the drawbar and

that his request was flatly refused, and he was informed that if he could not do the work the foreman would get some one who could. No element of negligence was involved in this transaction. Nor is there any contention that the employer violated any rule of law or any duty which it owed the plaintiff in determining that the removal of the drawbar was a one-man job. The plaintiff was not acting under compulsion or in any emergency, nor was he influenced by any promise of additional help. Under these circumstances he is conclusively presumed to have assumed such risks as were ordinarily incidental to his work. * * *" See also Chestnut v. Chicago, B. & Q. R. Co., 284 Ill. App. 317, 1 N. E. (2d) 811.

This is a clear case of assumption of risk, whether negligence had been shown or not, and the learned court below properly refused to take off the nonsuit which it had entered. In this view of the case, the other assignments need not be considered."

(d) *Cases Cited by Petitioner Distinguished.*

The petitioner urged that the decision of the Supreme Court of Pennsylvania is in conflict with the applicable decisions of the Supreme Court of the United States.

We will consider these cases and attempt to distinguish them.

Bailey vs. Central Vermont Railway, 319 U. S. 350; 63 Sup. Court 1062:

Argument

This was an action under the Employers' Liability Act instituted in the State Court of Vermont to recover damages for the death of an employee of a railroad. The jury rendered a verdict for the plaintiff and on appeal the Supreme Court of Vermont reversed the decision, holding that a motion for a directed verdict should have been granted because no negligence was shown. The negligence alleged against the defendant was its failure to use reasonable care in furnishing Bailey with a safe place to work. The evidence presented in that case showed that Bailey met his death when he fell from a bridge about eighteen (18) feet above the ground. He was working on a cinder car on the bridge, his job being to open the hopper car so that cinders could be dumped through the ties in the bridge floor onto the railway below. The only available footing on the side of the car was about twelve (12) inches wide, of which eight (8) or nine (9) inches was taken up by a raised stringer; there was no guard rail. The hopper car could have been opened before it was moved onto the bridge. The court found that there was sufficient evidence to go to the jury on the question presented.

In the case at bar, there is neither allegation nor proof that the petitioner did not have a safe place to work. He alleges three (3) grounds of negligence as follows: Insufficiency of tools and appliances with which to do the work; inadequate and unskilled help, and the negligence of the fellow employees in releasing their hold on the pipe.

The first of these is the failure to provide adequate equipment to do the work. He made out his case, if at all, by his own testimony. He admitted that the equipment consisted of two nose trucks, a one-wheeled dolly, a crow bar and rollers, all of which equipment was in the freight house

on June 26, 1939, the date of the accident. The nose truck is a two-wheeled truck about five feet long with a piece of steel extending up on top of it about 8 inches, balanced on two wheels; it has two handles extending ten (10) or twelve (12) inches on each side; which are on the opposite end from the two wheels. In connection with this equipment it is important to know that Mr. Blair himself chose the nose truck because he considered it the best type of truck to use for handling the pipe. He did not attempt to prove any defect in the equipment. He stated that the dolly or nose truck, was not hard to push, and that all the men had to do was to push and steady the pipe onto the truck. With this same truck, Mr. Blair and his two assistants unloaded one piece of pipe; after the accident he continued to work and did not think he was seriously injured, and the three men proceeded with the same truck to reload the third piece of pipe, the second piece having slid onto the Mill truck at the time of the injury to Mr. Blair.

The second item of negligence was insufficiency of help in the unloading of the pipe. Mr. Blair was the only man working in the freight house, where he had been employed as a trucker for more than four years. He did not attempt to prove that it was necessary for more than two men to assist him in moving these pipes, nor that they were unable to do the job. In fact, Mr. Robert J. Miller and Mr. Domenick Fanno, the two assistants, who were called upon by Mr. Blair to help him, very successfully assisted in moving the first and the third piece of pipe. He did not produce any testimony to the effect that it was usual or customary to have more men on a job of this kind, nor in fact did he prove anything about these men except their ages. In the petition for certiorari, the petitioner refers to the one

assistant as the "aging and infirm car inspector". Mr. Miller, the car inspector was sixty-three (63) years old at the time of the accident, and Mr. Fanno was fifty-seven (57) years of age. It has been said in a number of decisions that youth alone is not sufficient evidence of negligence: *Rickert vs. Stephens*, 133 Pa. 538 (19 A. 410); this should apply also to age.

In *Snodgrass vs. Carnegie Steel Company*, 173 Pa. 228 (33 A. 1104), it is held that the plaintiff, in order to recover in an action for personal injuries where he claims his injury was caused by an incompetent fellow servant must show (1) that the accident was the result of some negligent act or omission of the fellow servant; (2) that the fellow servant was incompetent for the duty he had to perform; (3) that the fact of his incompetence was known to the defendant when he was employed, by reason of the fellow servant having a reputation for incompetency, and that defendant had knowledge of the incompetence during the employment and before the accident. None of these elements appear in this case. Also, after this accident the plaintiff without protest to any one, or a request for any other help, loaded the third piece of pipe, which was of the exact size of the second, carried it on the same little truck across the warehouse floor, and unloaded it onto the Tube Mill truck. Nowhere in the Record do we read of any protest made to the men themselves, or to the station agent as to the equipment or the helpers, although he had been just injured as above indicated.

In the case of *Lloyd vs. Norfolk and W. R. Railroad Company*, 151 Va. 409, 145 S. E. 372, it was held that where a track laborer had loaded seven (7) rails with the same

assistants, this fact showed that the work could be accomplished with safety by the force then employed.

The third ground of alleged negligence was stated by the petitioner, "the two men leaving go of it" (the truck). The petitioner testified that an uneven place in the floor started the pipe to slip and that then the men let go of the nose truck, and the pipe slipped onto the warehouse floor. There was no allegation in the Statement of Claim, as to the condition of the floor. In its Charge to the jury, the court did not present to them any question as to the negligence of the defendant relative to the condition of the floor. There was no evidence to show any defect in the floor, with which the defendant (respondent here) could be charged, and this item was not before the jury when it brought in its verdict. Therefore, if the pipe began to slide because of an unevenness in the floor, an innocent cause, there could be no more negligence in the helpers' letting go of the handles in this sudden emergency than in the petitioner attempting to hold onto his handle and suffering injury as a consequence thereof. If the accident occurred as stated by the helpers when called as respondent's witnesses, it occurred when they were about to push the pipe onto the Mill truck. Mr. Fanno, one of the helpers, stated that they gave it a push and that the hand truck hit the Mill truck, flew back and struck the petitioner in the side. The trial Judge and the court en banc, had decided that the testimony of this witness "we give him push", might be some evidence of negligence, but the Supreme Court concluded that the only logical way to get the pipe onto the truck was to give it a push. There was no other way to load it. In order to make out negligence in this item, the petitioner would be forced to show

that the push was unusual or unnecessarily violent. This testimony was brought out in respondent's case, and petitioner did nothing to use it to his advantage. He did not even cross examine Fanno as to how much of a push they gave it, whether it was an ordinary or extraordinary push; what part of the nose truck struck the Mill truck, or any other particulars. The reason for this is apparent, when we consider that the petitioner had testified that the accident took place at the other end of the warehouse, and nowhere near the Mill truck. In his Charge to the Jury, on this phase of the case, the trial Judge said:

> "The natural result of them doing that would have caused greased pipe to slide forward, which is exactly what they desired it to do, on to the bed of the automobile truck. The pipe did start to slide forward, as they intended, when they gave it a push. Naturally, as soon as one end of that pipe touched the floor, the weight of the pipe being towards the floor would cause the nose truck to do exactly what the witness said it did do, fly back and hit Mr. Blair."

If what happened was the natural and desired result, how could there be any negligence in bringing about that result.

The Bailey case says: "To deprive these workers of the benefit of a jury trial in *close* or *doubtful* cases, is to take away a good portion of the relief which Congress has afforded them".

We submit that the distinction between the Bailey case and our case is obvious and that not only is the case at bar not a close or doubtful case as to negligence, but it

does not even present a scintilla of evidence much less come up to the requirements pronounced in the Brady case, 320 U. S. 476, *supra*, to the effect that, "the weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be presently left to the discretion of the triers of fact, in this case, the jury".

In the case at bar, the petitioner was given every opportunity of proving his case. He was represented by counsel who has had much experience in this type of case and knows the measure of proof necessary. If petitioner did not produce evidence to sustain the allegations of negligence it must have been because such proof was not available, and, as a matter of fact, he has not to date intimated that he might have produced more evidence on the subject of the controversy. An examination of the Record will show that his counsel was not impeded or hampered in any manner by either the court or opposing counsel. In attempting to make out his case, plaintiff was his own witness, and the story he told as to the occurrence of the accident was exactly opposite to the story told by the respondent's witnesses. After verdict for the plaintiff the case was argued at length before the court en banc, and again after appeals by both parties it was argued before the Supreme Court of Pennsylvania and a decision handed down by that Court without dissent.

Pederson vs. D. L. & W. Ry. Company, 229 U. S. 146, 33 Sup. Ct. 648:

The main burden of the Pederson case was to establish that the plaintiff was employed in interstate commerce at the time of his injury. This case is cited by the petitioner for the proposition that the Federal Court cannot enter a

judgment for defendant n. o. v. after a verdict for the plaintiff. We respectfully call the court's attention to the fact as shown in the first part of this Brief, that it was a State Court and not a Federal Court which entered the judgment in our case, and the Constitutional prohibition does not apply to the State Court.

Tennant vs. Peoria and P. U. Ry. Company, 341 U. S. 29; 64 Sup. Ct. 409:

This was an action under the Employers' Liability Act for recovery of damages for the death of plaintiff's intestate. The action was instituted in the Federal Court for the Southern District of Illinois, and the plaintiff recovered a verdict of $26,250.00. On appeal the Circuit Court of Appeals reversed the judgment after finding that, while there was evidence of negligence by the respondent, there was no substantial evidence that this negligence was the proximate cause of Tennant's death. There was evidence that the Railroad Company had a written rule as well as a practice and custom of ringing the engine bell in the course of coupling operations. Tennant was a switchman in one of the yards. The engineer saw Tennant on the west side of the engine while waiting for the signal to backup and saw him walk toward the rear end of the engine and he was never seen alive after that. His duty was to stay ahead of the engine. The Supreme Court of the United States called attention to the legal proposition that there was a presumption in favor of Tennant, that he was in the performance of his duty and therefore, that he was back of the engine. He was apparently struck and killed by the backing engine, there being no eye witnesses to the occurrence. The question before the Court was whether the bell should have been ringing under the circumstances of the case. As

stated by the Court, there was ample, though conflicting evidence, that the rule as well as practice and custom required the ringing of the bell in just such a situation. The ringing of the bell may well have saved has life. It is quite obvious that the question of proximate cause in the Tennant case was for the jury. If there was a custom and rule requiring the ringing of the bell, the employee might well have relied upon it.

Obviously there is no similarity whatever between the facts in the Tennant case and those in the case at bar. If the petitioner cited it as authority for the proposition that the Supreme Court might take jurisdiction of a case under the Employers' Liability Act after an adverse decision by an Appellate Court, with this we have no quarrel, but we fail to see how it can be authority and persuasive toward moving the Court to reverse in this case. Although in the Tennant case, the question of negligence seems very clear as stated in the majority opinion, yet Mr. Chief Justice Stone and Mr. Justice Roberts were of opinion that the judgment should have been affirmed rather than reversed.

In his argument at p. , the petitioner states that, "It is difficult to conceive of judicial view of the facts here presented more in conflict with the principle of liberal construction of the Act in the light of its prime purpose, the protection of employees against injury, set forth by Mr. Justice Murphy in Lilly vs. Grand Trunk W. R. Co., U. S. 87, L. Ed. 323, than the view accorded these facts by the Supreme Court of Pennsylvania."

A careful reading of the Opinion of the Supreme Court in the case of *Lilly vs. Grand Trunk W. R. Co.*, 317 U. S. 481, 63 Supreme Court 347, shows that the cause of action arose under the Boiler Inspection Act, and not mere-

ly under the Federal Employers' Liability Act. To show the inapplicability of the Lilly case to the case at bar, we quote, without comment, the following from the Opinion of your Honorable Court at p. 351:

> "Negligence is not the basis for liability under the Act (Boiler Inspection Act). Instead it 'imposes upon the carrier an absolute and continuing duty to maintain the locomotive, and all parts and appurtenances thereof, in proper condition, and safe to operate * * * without unnecessary peril to life or limb.'"
>
> "* * * Any employee engaged in interstate commerce who is injured by reason of a violation of the Act may bring his action under the Federal Employers' Liability Act, charging the violation of the Boiler Inspection Act."
>
> "* * * The Act, (Boiler Inspection Act), like the Safety Appliance Act, 45 U. S. C. A. sec. 1 et seq., is to be liberally construed in the light of its prime purpose, the protection of employees and others by requiring the use of safe equipment."

Finally, in his Brief at p. , the petitioner quotes the Opinion in *Union Pacific Railroad Company vs. Hadley*, 246 U. S. 330, 38 Supreme Court 318, as authority for the proposition that it is error for the Court below to consider items of negligence singly but that all of the alleged acts of negligence should be considered as a whole.

We respectfully submit that the case above cited is not authority for the proposition that acts of negligence may not be considered separately. All that the Opinion in that case decides is that "The Court was justified in

leaving the general question to the jury, *if it thought that the defendant should not be allowed to take the bundle apart and break the sticks separately and if the defendant's conduct viewed as a whole warranted a finding of neglect.*" It is to be noted that it is left to the discretion of the Court as to whether the bundle should be taken apart and the sticks broken separately, in other words whether the evidence is such as to justify taking apart the various acts which are alleged as negligence, and also it is to be noted that it was the defendant and not the plaintiff who wished to have this separation of the evidence. Further, in the Hadley decision we have a case where the employees of a railroad company ran one train into another. How there could fail to be negligence in a situation like this it is hard to understand. The position taken by the Railroad in the Hadley case was that the acts of the deceased and not the negligence of the Railroad, were the proximate cause of his death, but when it is considered that under the Federal Employers' Liability Act contributory negligence is not a defense but merely operates to reduce the damages, we have almost a case of res ipsa loquitur as to the negligence of the Railroad Company.

PART II.

JUDGMENT ON VERDICT NOT MAINTAINABLE BECAUSE OF ERRONEOUS CHARGE OF THE TRIAL JUDGE

The Court of Common Pleas granted a new trial in this case for the reason that the trial judge had submitted to the jury three (3) alleged grounds of negligence on the part of

the defendant company (Respondent here), two (2) of which were not supported by the evidence. We quote the relevant portion of the Opinion at pages 135a-136a as follows:

> "Plaintiff contended that the defendant was answerable for negligence in three particulars, viz., failure to provide adequate equipment for the work; failure to provide sufficient help, and carelessness of its employees as described above. The trial judge asked the jury to pass on all three particulars. This was error.
>
> While there was sufficient testimony to support the third particular and, therefore, to permit the plaintiff to recover, there was no sufficient testimony to support the first and second, although under the charge of the court the jury was permitted to base a recovery on either. We can not now determine on which particular the jury found the defendant had been negligent, and a new trial will be granted."

On appeal to the Supreme Court, defendant submitted that not only was there no negligence proven relative to adequate equipment and sufficient help, but also the petitioner did not sustain the burden of proving negligence of a fellow-servant for which the respondent would be answerable, and, therefore, the Court granted judgment for defendant (respondent here). We submit that if the third item of negligence had been proven as set out by the court below, then considering the charge, the awarding of a new trial was inevitable as the verdict could not stand. To submit to the jury three (3) possible grounds of negligence, when the proof sustains only one, is reversible error, especially so when it is a matter on which the plaintiff has the

burden of proof. In *Standard Pennsylvania Practice*, Volume 9, Section 503, Page 428 we read:

> "On the other hand where the court made an incorrect and misleading statement as to a material matter in its charge, an appellant can not surmise that the verdict was not affected thereby": Raskus vs. Allegheny Valley Street Railway Company, 203 Pa. 34-40.

In *Kelly vs. Crawford*, 137 Pa. Superior Court 197, 8 A. 2d. 449, a new trial was granted in a case where the trial judge instructed the jury as indicated in the following quotation from the syllabus:

> "In such case, it was basically and fundamentally erroneous and prejudicial for the trial judge to charge that if the lights on the sweeper were out of order, plaintiff should have put flares on the highway, where all the testimony in the case showed that the sweeper was moving at the time of the accident and there was no testimony to show that it had stopped."

In *Saunders vs. Pittsburgh Rys. Co.*, 255 Pa. 348 (99 A. 1006), the Court held it to be clear error to submit to the jury for their determination the question of fact as to how long beyond the actual time of her death Mrs. Saunders would have probably lived if she had not been injured when "there is not a syllable of evidence which would justify the jury in reaching any definite conclusion upon that point."

In our case the trial judge charged that the jury might convict the defendant of negligence if it found that the defendant had failed to provide adequate equipment for the work, or had failed to provide sufficient help for the work,

neither of which items of negligence are sustained by any evidence.

We respectfully submit that any verdict for the petitioner in this case is against the weight of the evidence. The petitioner's story as to how this accident happened was completely discredited by respondent's witnesses. The petitioner testified in chief that the pipe started to slip as they went through the door into the warehouse from the car (19a), and that this slipping was caused by the uneven part of the floor at that point. On cross-examination on page 43a, he testified that the tube when it landed was completely inside of the freight house station on the floor.

Respondent's witnesses, including the driver of the Tube Mill truck who was entirely disinterested, all testified that the accident took place at the Tube Mill truck, and that the pipe slid on the truck and not onto the floor of the warehouse as petitioner alleged. The car inspector, Mr. R. J. Miller, testified as follows at 70a:

> "Q. Where did this occur?
> A. In the freight house by the truck.
> Q. Just as you were putting it on the truck?
> A. Yes.
> * * * * * * *
> Q. Did it go on into the truck?
> A. Went into the truck."

Domenick Fanno testified at page 72a that:

> "* * * and when we give a push the little truck went against the big truck and the pipe went on the truck * * *."

Mr. C. V. Main, the truck driver testified at page 84a:

"* * * why, *they was putting the one (tube) on the truck* and I came around behind this tube that was sticking back of the back handles of the truck and I think I laid my hand on it to help balance a little just before they got to the truck * * *."

If petitioner's story is correct, the jury would be compelled to disregard all the testimony of respondent's witnesses, including that of Fanno relative to the push or shove which seemed to cause so much conjecture in this case, for the simple reason that at the time the pipe started to slide they were nowhere near the Tube Mill truck and hence, it would be physically impossible for the little truck to hit the big truck as testified to by Mr. Fanno. The only items of negligence then would be the condition of the floor which was not submitted to the jury, and the kind of equipment, and the men assigned to help on the job. We have shown the failure of plaintiff to carry successfully the burden of proof as to these items. If the jury believe the testimony of respondent's witnesses, then they must disregard the petitioner's entire case, and base their finding of negligence upon the push which landed the pipe on the bed of the truck where it was supposed to land. Without further description of the alleged push, and the utter lack of testimony relative to what part of the nose truck struck the Mill truck, that this was in any manner unusual or extraordinary (for all we know, it might have been the correct way of loading the pipe from the nose truck into the Mill truck,—and the presumption is that it was, as negligence is never presumed but must be proven), any finding of negligence would be a mere guess or conjecture. On this point we call the Court's attention to the early case of *Phila. & Reading R. R. Co. vs. Hummell*, 44 Pa. 375, where the Court, speaking through Mr. Justice Strong, says at page 377:

> "What is ordinary care, and what is negligence, are inquiries, in most cases, to be answered by a jury; but negligence is not to be found without evidence. There is always a presumption against it, and therefore a plaintiff who asserts it, and avers that he has received an injury in consequence of it, must always adduce proof that the defendant did not exercise ordinary care. If no such proof be adduced, the presumption of innocence remains, and it is error to submit to the jury the question whether there was negligence."

In this case there was not even the scintilla of evidence spoken of in *Lonzer vs. Lehigh Valley R. R. Co.*, 196 Pa. 610, 46 A. 937, and *Holland vs. Kindregan*, 155 Pa. 156-160, 25 A. 1077, which hold that the Court may direct a verdict for the defendant even in case of conflict of testimony, if the evidence amounts only to a scintilla.

Respondent respectfully submits that the decision of the Supreme Court of Pennsylvania in this case is not in conflict with the decisions of your Honorable Court, and that its judgment therefore should be affirmed.

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SUPREME COURT OF THE UNITED STATES.

No. 265.—October Term, 1944.

Clarence W. Blair, Petitioner,
vs.
Baltimore & Ohio Railroad Company, a Corporation.

On Writ of Certiorari to the Supreme Court of Pennsylvania.

[January 29, 1945.]

Mr. Justice Black delivered the opinion of the Court.

A jury in the Common Pleas court of Allegheny County, Pennsylvania, awarded the petitioner a verdict for $12,000 damages for personal injuries in his action against the respondent railroad under the Federal Employers' Liability Act, 45 U. S. C., § 51 *et seq.* That Act authorizes an employee to recover for such injuries if they result "in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence in its . . . appliances . . . or other equipment." The complaint set out in great detail the events leading to the injury and alleged that the injury was the result of the defendant's negligence in failing under the circumstances narrated, to provide petitioner with reasonably suitable tools and appliances, a reasonably safe place in which to work, reasonably sufficient and competent help to do the work, and the negligence of the respondent's employees who assisted him in doing the work. Respondent moved for judgment notwithstanding the verdict on the ground that there was no evidence to prove any negligence on its part. This motion was denied. Although the trial judge thought the verdict was "just and reasonable", respondent's motion for new trial was granted, on the ground that while the testimony was sufficient to support a finding that the negligence of respondent's employees contributed to the injury, it was not sufficient to show that the injury resulted from defendant's failure to provide adequate equipment, or sufficient and competent help. Both parties appealed to the Pennsylvania Supreme Court, which reversed, holding that petitioner had assumed the risk of injury by remaining in the employment

and that there was no evidence to support negligence in any respect. 349 Pa. 346.

To deprive railroad "workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them." *Bailey* v. *Central Vermont Railroad Co.*, 319 U. S. 350, 354. Because important rights under the Act were involved, we granted certiorari.

Despite conflicting evidence, there was sufficient evidence to justify the jury in finding that the injury was inflicted under these circumstances. Petitioner's duties were to load and unload inbound and outbound freight. In unloading a car standing at the platform adjacent to respondent's warehouse, petitioner came to three 10 inch seamless steel tubes, approximately 30 feet long and weighing slightly more than a thousand pounds each. The pipes were greased and slick. The petitioner went to his superior, informed him that the pipes were too heavy for him to move and suggested that it was not customary for the railroad to unload pipes of this kind at its warehouse, but to send the car directly to the consignee's place of business where it had proper equipment for unloading heavy material. This suggestion was rejected and petitioner was then told to get Mr. Miller, the car inspector, and Mr. Fanno, the section man, to help him unload.

Petitioner's insistence that the three could not unload the heavy pipes was overridden, and he was then told to go ahead and do the work or they "would get somebody else that would." Under these circumstances, petitioner undertook to unload the pipes and carry them through the warehouse to place in the consignee's truck which had backed up to the warehouse platform on the opposite side from the railroad car. The best equipment available for moving the pipes was a "nose truck" of the kind commonly used in railroad stations to move freight and luggage. It was about five feet long and two feet high, consisting of a flat metal frame, with an upright flange and two wheels at one end and wheelbarrow handles at the other. The problem was to balance three greased, 1000 pound, 30 foot steel tubes on this truck, move them across two platforms through the warehouse and place them in the consignee's truck. The men took the nose truck into the car, managed to get the first pipe lengthwise on it, worked it through the car door to the platform over a steel bridge connecting the car and the platform, and then carried it to the waiting truck. Petitioner held one handle of the nose truck with one hand and

the steel tube with the other. Miller occupied the same position as to the other handle and the pipe. Fanno held the pipe and the truck at its wheel end. They were all necessarily crouching, since the truck was only two feet high when moved in a level position, as it had to be, to keep the tube from slipping off. The first tube was successfully moved. While they were attempting to move the second tube in the same manner, it slipped. Fanno and Miller released their holds, but petitioner did not. The heavy tube in slipping caused the truck to kick back resulting in petitioner's injury.

In the petitioner's four year service this was the first occasion that such heavy pipe had been moved at the warehouse. Fanno, aged 60, and Miller, aged 68, had never before assisted petitioner in such a movement; their duties were entirely different. The evidence indicated that the immediate cause of the greasy pipe's slipping as it did was either (1), an uneven place on the warehouse floor due to its having sunken in; or (2) pushing the nose truck against the standing company truck with such force as to make the tube move with great suddenness. The fact that Fanno and Miller released their grips after it began to slip also contributed to the suddenness and force of the kickback of the nose truck which caused the petitioner's injury.

We think there was sufficient evidence to submit to the jury the question of negligence posed by the complaint. The duty of the employer "becomes 'more imperative' as the risk increases." *Bailey* v. *Central Vermont Railway Co.*, 319 U. S. 350, 352, 353. See also *Tiller* v. *Atlantic Coast Line*, 318 U. S. 54, 67. The negligence of the employer may be determined by viewing its conduct as a whole. *Union Pacific Railroad Co.* v. *Hadley*, 246 U. S. 330, 332, 333. And especially is this true in a case such as this, where the several elements from which negligence might be inferred are so closely interwoven as to form a single pattern, and where each imparts character to the others.

The nature of the duty which the petitioner was commanded to undertake, the dangers of moving a greased, 1000 pound steel tube, 30 feet in length, on a 5 foot truck, the area over which that truck was compelled to be moved, the suitableness of the tools used in an extraordinary manner to accomplish a novel purpose, the number of men assigned to assist him, their experience in such work and their ability to perform the duties and the manner in which they performed those duties—all of these raised questions appropriate for a jury to appraise in considering whether or not

the injury was the result of negligence as alleged in the complaint. We cannot say as a matter of law that the railroad complied with its duties in a reasonably careful manner under the circumstances here, nor that the conduct which the jury might have found to be negligent did not contribute to petitioner's injury "in whole or in part." Consequently we think the jury, and not the court should finally determine these issues.

The court below, however, thought that the plaintiff should not recover because he had assumed the risk of this danger. It is to be noted that at the time this case was tried Congress had passed an act which completely abolished the defense of assumption of risk. 53 Stat. 1404. *Tiller* v. *Atlantic Coast Line*, *supra*. We need not consider whether this statute applies to this case, since we are of opinion that it cannot be held as a matter of law that the petitioner assumed the risks incident to moving the steel tubes.

It is true that the petitioner undertook to do the work after he had complained to the company that the pipe should not be moved in the manner it was. But he was commanded to go ahead by his superior. Under these circumstances it cannot be held as a matter of law that he voluntarily assumed all the risks of injury. The court below cited by way of comparison its holding in a former decision, *Guerierro* v. *Reading Co.*, 346 Pa. 187. There it had announced the rule that an employee has a duty to quit his job rather than to do something which he knows, or ought to know is dangerous. This Court does not apply the doctrine of assumption of risk so rigorously. In *Great Northern Railroad Co.* v. *Leonidas*, 305 U. S. 1, we affirmed the judgment of the Supreme Court of Montana, 105 Mont. 302. In its opinion the Montana court stated: "We are not prepared to say that the hazard of carrying the [railroad] tie was so open and obvious that the plaintiff, as a matter of law, must be held to have assumed the risk of injury by yielding obedience to the command of the foreman." So here, we do not think that this petitioner can be held to have assumed the risk by obeying the command of his employer's foreman to go on with his job. The judgment of the Supreme Court of Pennsylvania is reversed, and remanded to that court for proceedings not inconsistent with this opinion.

Reversed.

The CHIEF JUSTICE and Mr. Justice ROBERTS are of the opinion that the judgment should be affirmed.